The attention of the court has also been drawn to the C.O.L.A. which was paid to Government employees before the Suffian salary scheme came into force and to the special relief allowance currently paid to Government employees. The advertisements for Government vacancies before Suffian show that the salaries offered included the prevailing rates of cost of living allowance and General Order Cap. H. 9(a) clearly provided that for purposes of calculating overtime pay for monthly rated staff the cost of living allowance was to be included. As the food allowance paid to the respondent by the appellant was part and parcel of the contract of service in this case there is no reason why it should not also be included for purposes of calculating overtime pay. It is significant that in the case of the special relief allowance currently paid to Government employees the Government advertisements for vacancies have not included it as a term of the contract of service and it is therefore not surprising that it is excluded for purposes of calculating overtime pay.

I therefore agree with the labour officer that the food allowance had to be included as part of the respondent's wages for purposes of calculating his overtime pay and in the event I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Keith Sellar, Tennakoon & Pillay.*

DIRECTOR-GENERAL OF INLAND REVENUE v. EE SIM SAI

[O.Cr.J. (Ibrahim J.) March 16, 1976]
[Malacca — Originating Motion No. 6 of 1975]

Income Tax — Undisclosed income — Additional assessment — Whether in assessing a taxpayer's undisclosed income the consideration stated in Form 14A prescribed under the National Land Code is irrebuttable.

Evidence — Form 14A prescribed under National Land Code — Whether irrebuttable — Evidence Act, 1950, ss. 91 and 92.

In this case the appellant sent to the respondent a Notice of Additional Assessment of $21,670.15 for the year of assessment 1970. That sum was assessed after comparing the capital worth of the respondent at the end of 1968 and 1969 as computed by the appellant. In 1969 the respondent and another had bought 14 lots of land which made up a certain housing estate. The consideration stated in the prescribed Form 14A which was presented and registered at the Land Office, Malacca under the National Land Code was $126,472.50 and as the respondent's share in it was 2/3rd the appellant had credited the sum of $84,315 as the respondent's undisclosed income for that year. The respondent disputed that amount and appealed to the Special Commissioners. At the hearing before the Special Commissioners the appellant merely relied on the consideration stated in Form 14A which he alleged was irrebuttable. The Special Commissioners decided otherwise and allowed the respondent to call several witnesses and produce several documents to establish his contention that he and the other person had bought the said land not at $126,472.50 as stated in Form 14A but at $65,000 and that his 2/3rd share of it was $43,500. The Special Commissioners decided that $43,500 was the actual price paid by the respondent and that amount should be taken into account to compute the respondent's capital worth as at December 31, 1969. They accordingly ordered that the Notice of Additional Assessment for the year of assessment 1970 be amended to give effect to their decision.

Held: (1) as Form 14A is dispositive in character, section 92 of the Evidence Act would operate in this case;

(2) on the operation of section 92 other evidence was admissible to rebut the consideration stated in Form 14A as the appellant was a stranger to it;

(3) in any event the court was of the view that the Special Commissioners had exercised their discretion judicially when they admitted the evidence in rebuttal adduced by the respondent;

(4) not only greater mischief but also injustice would be caused if the consideration stated in Form 14A was irrebuttable and the amount of the taxpayer's capital worth was thereby deemed to be that amount when, for instance, he has raised part if not all of the amount by a loan from a bank;

(5) in this case there was overwhelming evidence adduced by the respondent to justify the Special Commissioners in coming to their decision;

(6) on the facts before the Special Commissioners there was evidence to support their decision and their decision was correct in law.

CASE STATED.

Baharuddin bin Sulaiman (Federal Counsel) for the appellant.

Ting Poi Teck for the respondent.

Ibrahim J.: On July 1, 1972 appellant sent to respondent a Notice of Additional Assessment of $21,670.15 for the year of assessment 1970. That sum was assessed after comparing the capital worth of respondent at the end of 1968 and 1969 as computed by appellant. In 1969 respondent and Puan Tay Hor Tee had bought 14 lots of land which made up Tai Guan Estate. The consideration stated in the prescribed Form 14A which was presented and registered at the Land Office, Melaka under the National Land Code was $126,472.50 and as respondent's share in it was 2/3rd appellant had credited the sum of $84,315 as respondent's undisclosed income for that year. Respondent disputed that amount and appealed to the Special Commissioners.

At the hearing before the Special Commissioners appellant did not call any witness to give evidence but merely relied on the consideration stated in Form 14A which he alleged was irrebuttable. The Special Commissioners decided otherwise and allowed respondent to call several witnesses and produce several documents to establish his contention that he and Puan Tay Hor Tee had bought the 14 lots not at $126,472.50 as stated in Form 14A but at $65,000 and that his 2/3rd share of it was $43,500. The Special Commissioners decided that $43,500 was the actual price paid by respondent and that that amount should be taken into account to compute respondent's capital worth as at December 31, 1969. They accordingly ordered that the Notice of Additional Assessment for the year of assessment 1970 be amended to give effect to their decision. Appellant by notice dated April 24, 1975 required the Special Commissioners to state a case for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967 and the question of law for the opinion of the High Court is whether on the facts before the Special Commissioners there was evidence to support their decision and whether it was correct in law.

The grounds of appeal are:

"(a) That the Special Commissioners for Income Tax had misdirected themselves in receiving evidence to rebut the consideration stated under the National Land Code as presented for registration, insofar as the consideration is concerned between the parties and the Director-General of Inland Revenue as a stranger;
and

(b) That the Special Commissioners had misdirected themselves in law when they found that the purchase price of the said lots acquired by Respondent and Puan Tay Hor Tee was $65,000 and the purchase price applicable to Respondent's share should, therefore, be 2/3rd of $65,000 i.e. $43,500."

It is again contended by appellant before this court that the amount of consideration as stated in Form 14A is irrebuttable by virtue of section 91 of the Evidence Act while respondent's contention is that other evidence is admissible by virtue of section 92 of the same Act. The said sections reads as follows: —

"91. When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting varying, adding to, or subtracting from its terms:

Provided that —

...."

After analysing and comparing the two sections I am of the view that as Form 14A is dispositive in character, section 92 would operate in this case. *Sarkar on Evidence,* 12th edition, at page 774, in distinguishing the two sections, states, among other things, that section 91 refers to all documents whether dispositive or non-dispositive whereas section 92 deals with dispositive documents only and that the two sections complement and supplement one another. At page 775 it goes on to state:

"Section 92 comes into operation when the written instruments referred to in the section have been proved under section 91, that is, either by the production of the document itself, or by the production of secondary evidence of it, where secondary evidence is admissible under section 65. It is then that this section comes into play."

I am also of the view that on the operation of section 92 other evidence is admissible to rebut the consideration stated in Form 14A as appellant is a stranger to it. At page 777 of the same book it is stated:

"Section 92 Applies Only to Parties to Instrument and Not to Strangers. (Whether Parties on one side Only of a Deed are also Within the Rule of Exclusion). The words 'as between the parties to any such instrument' are very important, as they and the reference to 'separate oral agreement' in proviso (2) restrict the application of the rule only to the parties to the document or their privies. It does not apply to strangers who cannot be affected by the terms of a document to which they were not parties and which may contain untrue or collusive statements to serve some fraudulent purpose or things prejudicial to their interests; whereas section 91 applies to both strangers and parties. So, persons other than the parties to the instrument or their representatives in interest, i.e., third parties, are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document (section 99). The rule is not otherwise in England. Where a transaction has been reduced into writing merely by agreement of the parties, extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties, or their privies and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness or fraud of the parties; *nor, in proceedings between a party and a stranger, will the former be estopped, since there would be no mutuality* (Phip 11th Ed. page 799; Tay section 1149). Although section 92 expressly limits the operation of the rule to parties to instrument or their privies, yet the point has been made more clear by enacting section 99 which says that persons other than parties may given extrinsic evidence to vary a document." (The emphasis is mine).

Paragraph 19 of the 5th Schedule to the Income Tax Act, 1967 provides that the Special Commissioners shall have the power to admit or reject admissible or inadmissible evidence and it has been submitted by appellant that the Special Commissioners had not acted judicially when tney accepted evidence rebutting the consideration stated in Form 14A. This submission is based mainly on the ground that such evidence was inadmissible but as I have found that it is admissible there is not much force left in this submission. In any event I am of the view that the Special Commissioners have exercised their discretion judicially when they admitted the evidence in rebuttal adduced by respondent. I agree with them when they said in paragraph 16(c) of the Case Stated that:

"the purpose of the computation of capital worth of the respondent shown in folio 7B of Exhibit A2 was to compare the income returned by the respondent with the annual increase in capital worth together with other outgoings, such as private and living expenses. If the increase in capital worth together with the other outgoings was more than the income returned then the difference was treated as undisclosed income. For the purpose of computing the capital worth of a person the actual amount disbursed by him to acquire his assets should be taken into account, otherwise the annual increase in his capital worth would not correctly reflect his actual income."

Appellant has pointed out to the court that admission of other evidence to contradict or vary Form 14A would cause mischief to the Inland Revenue Department as it would make it difficult for the department to compute the capital worth of a taxpayer. In my view not only greater mischief but also injustice would be caused if the consideration stated in Form 14A is irrebuttable and the amount of the taxpayer's capital worth is thereby deemed to be that amount when, for instance, he has raised part if not all of the amount by a loan from a bank.

As to the facts I am satisfied that there is overwhelming evidence adduced by respondent to justify the Special Commissioners in coming to their decision that the sum of $43,500 was in fact respondent's purchase price of his 2/3rd share in the 14 lots. Exhibit A3 shows that on September 10, 1969 the registered owners (vendors) had entered into an agreement with Tai Ah Kau @ Tai Kian Cheong for sale of 67 lots of their land which included the 14 lots at the rate of approximately $1,800 per acre and Exhibit A4 shows that on September 12, 1969 Tai Ah Kau @ Tai Kian Cheong had entered into an agreement with

respondent and Puan Tay Hor Tee for sale of the 14 lots for a total consideration of $65,000 which would be at approximately $920 per acre. Subsequently on December 2, 1969 the original vendors and respondent and Puan Tay Hor Tee executed Form 14A in respect of the 14 lots. In his affidavit dated October 10, 1972 Tai Ah Kau @ Tai Kian Cheong has said that the original vendors had insisted that the price agreed between them should appear on Form 14A in respect of all the lots even though the actual price for the 14 lots was much lower and that he had been able to sell the 14 lots at a lower price than what was agreed with the original vendors because he had sold some other lots at a higher price. Tan Leng Teck, the advocate & solicitor who attested Form 14A, has said that respondent and Puan Tay Hor Tee had agreed to buy the 14 lots for $65,000 as stated in Exhibit A4 and that the 14 lots were transferred to respondent and Puan Tay Hor Tee on payment of $63,550 as evidenced by the 3 receipts (Exhibits A5, A6 & A7). There was a rebate of $1,450 which made up the price of $65,000.

I am therefore of the opinion that on the facts before the Special Commissioners there was evidence to support their decision and that their decision was correct in law. I therefore dismiss the appeal with costs and confirm the order of the Special Commissioners.

Appeal dismissed.

Solicitor: *Ting Poi Teck.*

RM. P. RM. P. V. PALANIYAPPAN v. N.PL. ST. M.V. RAMANATHAN CHETTIAR

[O.C.J. (Abdul Hamid J.) April 27, 1976]

[Kuala Lumpur Originating Motion 7 of 1972, Originating Summons No. 136 of 1966 and Originating Motion No. 47 of 1973]

Probate and Administration — Will executed abroad — In what circumstances copy can be admitted to probate — Whether parcener in Joint Hindu Family can make a will — Effect of adoption — Whether Hindu law in India applicable — Testator domiciled in India and making Indian Will — Probate and Administration Ordinance, ss. 25, 34, 77A — Courts Ordinance, s. 105(2).

Hindu Law — Joint Hindu family — Whether sole proprietor can dispose of properties by will — Effect of adoption — Applicability of law in India — Testator domiciled in India and making Indian will — Hindu Succession Act, 1956.

The applicant made an application for the revocation of a grant of probate of the will of Valliappa Chettiar (deceased). The will was executed in India and one of the questions in dispute was whether the original of the will was produced when probate was granted by the Senior Assistant Registrar to the executor named in the will (the respondents) limited until the original was admitted to probate. The other question raised was whether the deceased as sole parcener of the property had power to dispose of the property by will under Hindu Law. The applicant had been adopted by the widow after the original grant of probate had been made.

Held: (1) as the will was executed in India the question of its validity should be determined in accordance with the relevant Indian law. In this case the question of the validity of the will had been determined in India in accordance with Indian law and it was proper for the court to take cognizance of this fact. There was therefore no merit in the applicant's contention that the alleged will was invalid;

(2) in this case on the facts the original will had been produced and it was inspected and compared on the instruction of the Senior Assistant Registrar and it is reasonable to conclude that the Senior Assistant Registrar was satisfied that the requirements of section 25 of the Probate and Administration Ordinance were complied with before he proceeded to make the order to issue grant of probate limited until the original was admitted to probate;

(3) as sole parcener and absolute owner of the properties both in India and Malaysia the deceased was entitled to dispose of such properties by will;

(4) as the testator was domiciled in India and had made an Indian will, all questions of succession must be determined by Indian law. The Hindu Succession Act, 1956 therefore applied to the disposal by the deceased by will of his immovable properties in Malaysia;

(5) the applicant was not the deceased's adopted son at the time of the deceased's death. As the deceased was the absolute owner of the properties both in India and in Malaysia at the time of his death and was entitled to dispose of such properties in his will, there was no ground to warrant a finding that the ownership of the properties so disposed had not absolutely passed. The widow inherited the properties disposed of by will absolutely as from the time of the death of the testator;

(6) the application for revocation must necessarily fail and must be dismissed.

Cases referred to:-

(1) *Udham Singh* v. *Indar Kaur* [1971] 2 M.L.J. 263.

(2) *Bhim Sen* v. *State of U.P.* A.I.R. 1955 S.C. 435 at p. 436.

(3) *Tulasi Ammal* v. *Danalakshimi Ammal* A.I.R. 1934 Mad. 316.

(4) *Re Venkatachala Pillai & Ors.* (1889) 10 I.L.R. Madras 154.

(5) *Palaniappa Chettiar* v. *S. Solai* [1961] M.L.J. 283.

(6) *Liaw* v. *Blikas* [1965] 2 M.L.J. 9.

(7) *Re Tang Pui Sim* [1967] 2 M.L.J. 96.

(8) *Attorney-General* v. *Valliamum Atchie* 2 Ceylon Tax Cases p. 371.

(9) *Re Estate of T.M.R.M. Vengdasalam Chettiar, deceased* [1940] M.L.J. 155; [1941] M.L.J. 120 C.A.

(10) *Lal Bahadur* v. *Kanhaia Lal* 34 I.A. 65.

(11) *Attorney-General of Ceylon* v. *A.R. Arunachalam (No. 2)* [1957] A.C. 540; [1958] M.L.J. 43.

(12) *Smt. Sitabhai* v. *Ramchandra* A.I.R. 1970 S.C. 343.

(13) *C.S. Nataraja Pillai & Anor.* v. *C.S. Subbaraya Chettiar* A.I.R. 1950 P.C. 34.

(14) *In re Valentine's Settlement, Valentine & Ors.* v. *Valentine & Ors.* [1965] 1 Ch. 831.

ORIGINATING MOTION.

V.K. Palasuntharam (*Mrs. Cecilia Fernandez* with him) for the applicant.

M. Shankar (*Mrs. Shanta P. Menon* with him) for the respondent.

Abdul Hamid J.: On February 24, 1972 the applicant RM.P.RM.P.V. Palaniyappan formerly known as Alagappan s/o Valiappa Chettiar (I shall hereafter call "the applicant") filed an Originating Motion (O.M. 7/72) asking that the order of the Senior Assistant Registrar of August 9, 1960 and the issue of grant of probate dated February 20, 1961 to the respondent N.PL.ST.M.V. Ramanathan Chettiar (I shall hereafter call "the respondent") be revoked.